is able to satisfy that onus, by proving a short shipment, he is, to that extent, relieved from the obligation which would otherwise attach to him under the bill of lading, even in a question with an onerous holder."

On the evidence adduced in this case I found that the defendant, as a shipowner, had discharged the burden of proving that the goods in question were never in fact shipped on board the "S.S. Priam". The evidence of one Mr. James Perera, the Assistant Manager of the said Malaysian International Shipping Corporation Berhad, Penang (DW1) was to the effect that after the "S.S. Priam" had discharged its cargo at Penang, it was discovered that the goods in question were not on it. They instructed cargo tracers to trace the goods and were later informed that the said goods were still in the dock at New York and that they would be shipped on the "S.S. Peisander" which was expected to arrive in Penang on or about June 11, 1974. (See letter at page 15 of the agreed bundle of documents marked 'A'). The evidence of DW1 that the goods in question were never in fact shipped on board the "S.S. Priam" was not challenged in cross-examination and the plaintiff had in fact, through their solicitors, indicated that they were aware that the goods were never on board the vessel "S.S. Priam". (See paragraph one of the letter at page 24 of the agreed bundle of documents marked 'A'). There was also evidence to show that none of the goods in question were lost or stolen and that they were delivered by the defendant to the plaintiff who received them in June 1974. I therefore found on the evidence in this case and on the above-quoted authorities, that the defendant was not liable to the plaintiff in the circumstances and dismissed the plaintiff's suit with costs. As I had found that the defendant in this case was not liable, it was therefore not necessary for me to consider the arguments of counsel on the amount of damages, if any, recoverable if the defendant had been found liable.

Order accordingly.

Solicitors: *Presgrave & Matthews, Thillaimuthu & Phock Kin.*

HASHIM BIN ADAM v. DAYA UTAMA SENDIRIAN BERHAD

[O.C.J. (Mohamed Zahir J.) June 3, 1979]

[Kuala Trengganu — Civil Suit No. 91 of 1974]

Contract — Forest licence — Assignment or rights under licence — Whether a transfer of licence and therefore illegal — Restitution — Forest Rules, 1356, rr. 2, 5(i), 18 & 22 — Contracts Act, 1950, ss. 24 & 66.

Forestry — Forest licence — Assignment of rights — Whether transfer of licence and therefore illegal — Forest Rules, 1356, rr. 2, 5(i), 18 & 22.

In this case the plaintiff had obtained a forest licence. By an agreement between him and the defendants, it was agreed that the rights under the licence be assigned to the defendants, who should fell and remove the timber. The defendants did not carry out the terms of the contract with the result that the licence was cancelled. The plaintiff claimed $43,800 as damages. The defendants pleaded that the agreement was illegal, unenforceable and void.

Held: (1) the agreement in assigning the rights under the licence to the defendants was in effect a purported transfer of the licence which was prohibited by the Forest Rules and was therefore null and void;

(2) as both parties were aware that the licence was not transferable, no claim for restitution could be made.

Cases referred to:-

(1) *Tan Bing Hock* v. *Abu Samah* [1968] 1 M.L.J. 221.

(2) *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [1971] 2 M.L.J. 161.

(3) *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 M.L.J. 200.

(4) *Nam Seng & Co.* v. *Wing Yew (Tawan) Co. Sdn. Bhd.* [1978] 2 M.L.J. 198.

(5) *Chai Sau Yin* v. *Liew Kwee Sam* [1962] M.L.J. 152.

(6) *Menaka* v. *Lum Kum Chum* [1977] 1 M.L.J. 91.

CIVIL SUIT.

Mura Raju for the plaintiff.

Wong Fook Hin for the defendant.

Cur. Adv. Vult.

Mohamed Zahir J.: The plaintiff sues the defendant for a sum of $43,800 being damages arising from breach of a logging agreement dated July 31, 1973 entered between the parties.

Under the said agreement the defendant agreed among other things to completely fell and remove timber from a licensed area under Trengganu Forest Licence No. TR/PHNT. 77/73 in the District of Ulu Telemong, Ulu Trengganu under a licence granted to the plaintiff. The defendant was to pay the plaintiff $4 per forest ton of timber so felled and removed by way of tribute.

The plaintiff alleged that the defendant failed to honour the said contract and as a result the State Forest Officer cancelled the said forest licence. The sum of $43,800 claimed represents the premiums due to the Government before cancellation of the licence, tribute accruable had the timber been completely extracted and less advances taken.

The defence admits the transaction as pleaded by the plaintiff but denies the sum of $43,800 was due to the plaintiff. The defendant however did not plead as to the reason why they had failed to completely extract the timber although they admitted that they had felled about 1000 acres and removed 700 tons of timber. Their main defence is that the said agreement purporting to assign rights under the said licence was illegal, unenforceable and void, being in contravention of the provisions of Trengganu Forest Enactment No. 44 of 1356 and the rules made thereunder.

When the case came up for mention before me, both counsel agreed to make a written submission on the point of illegality or legality of the contract alone under Order 25 rule 2 of the Rules of Supreme Court. They both agree that the decision of the case rests entirely on the finding of the court on this point.

But I later discovered that the Forest Licence No. TR/PHNT. 77/73 was not included in the agreed bundle. I then caused the same to be photo-stated from the Forest Department and I asked both counsel whether they admit to the document including its contents. Both counsel agreed to the admissibility of the said licence and I accordingly included it in the agreed bundle of documents.

The top portion of the licence which is in the Bahasa reads as follows:

"KERAJAAN TRENGGANU
BORANG I
UNTOK MENGAMBIL KELUARAN HUTAN
MENGIKUT KIRA2 LEJER
(Tidak boleh di-pindah milek)
DI-KELUARKAN DI-BAWAH KAEDAH2 HUTAN, 1356
KAEDAH 2 DAN 18"

Section 2 of the Forest Rules, 1356 reads as follows:

"2. Except as provided in sections 53 and 54 or otherwise in these rules, no person shall

(a) fell, cut, ring, lop, tap or injure by fire or otherwise any tree on State land;

(b) cut, convert, manufacture or burn to charcoal any timber on State land; or

(c) cut, collect or remove any timber, firewood, charcoal, or other forest produce included in the royalty rate list published in accordance with rule 8,

except under and in accordance with the conditions of a licence in Form I, II or III issued by a Forest Officer, or of a licence in such other form and issued by such person as the Sultan in Council may approve in any special circumstances or for any particular class of produce. No licence thus issued, except that issued to a statutory body and having the prior written consent of the State Government to such transfer, shall be transferable."

Section 18 of the rules relates to extracting forest produce on alienated land but such extraction is also liable to royalty. However, royalty may be exempted from payment as to the whole or any part thereof. Subsection (iii) of section 18 reads as follows:

"(iii) Licences issued under this rule may be for any period not exceeding six months and shall not be transferable, and except as provided in the preceding clauses of this rule, the provisions of rules 4, 5, 8 and 13 shall apply to such licences as if they were licences issued under rule 2."

Rule 2 relates to State land.

Let us consider whether the agreement between the parties contravenes rule 2 of the rules in that the plaintiff had transferred the licences to the defendant without the prior written consent of the State Government. Clause 1 of the agreement reads as follows:

"1. In consideration of the payment to be made to the First Party by the Second Party at the rate and in the manner hereinafter provided the Second Party shall have the sole right for himself his workmen employees and agents with the necessary tools and implements to enter upon the said felling area and to fell and remove the forest produce from the said felling area."

Clauses 2, 3 and 4 deal with loans and payment from the defendant to the plaintiff. Clause 5: the defendant was to be responsible for the wages of labourers, insurance for accidents and supply of sufficient machinery. Clause 6: the defendant to be responsible for any offence committed under the Forest Rules or Road Transport Regulations. Clause 7: the defendant was to pay the premiums due and Clause 8: the plaintiffs was to seek further extensions of the Forest Licence if so required by the defendant.

In other words, the defendant was to work on the area, enjoy the benefits therefrom, be responsible for those obligations as agreed, pay to the plaintiff $4 for each forest ton of timber extracted. The plaintiff's obligation was merely to seek the extension of time of the licence.

Counsel for the defendant argued that the licence was issued under rule 18 of the Forest Rules, 1356 which affects alienated land. Counsel for the plaintiff argued this land is not alienated land and as such rule 18 is not applicable. But in my own opinion it is immaterial whether the licence was issued under rule 18 or rule 2, although I am of the opinion that it was issued under rule 2. It would appear from the licence the land was a State land as it was a part of the former lands held under Licence Nos. 23/67 and 33/70 in the area of about 2,350 acres.

Counsel for the plaintiff argues that the agreement did not contravene rule 2 as the rule intended to prohibit the transfer of the licence as a legal instrument. He submitted that the rule did not prohibit the licensee from parting with some or all the benefits and obligations under the said licence. He pointed out that such licences were issued to persons who had neither means nor capital to work the concessions and he urged that this fact should be accorded with judicial notice.

Counsel for the plaintiff distinguished this case from *Tan Bing Hock* v. *Abu Samah*[1] where the condition in the licence is worded in this manner:

"No transfer by power of attorney to another person or by subletting or by other means and no subcontracts or partnership may be made in connection with the licence in question without prior approval in writing of the District Forest Officer."

In the instant case the condition in rule 2 merely states as follows:

"No licence thus issued, except that issued to a statutory body and having the prior written consent of the State Government to such transfer, shall be transferable."

Counsel for the plaintiff was obviously in error when he submitted that there was not written the words "Not Transferable" on the licence. Actually there are the words "Tidak boleh di-pindah milek", having the meaning of not transferable.

Counsel for the plaintiff further distinguished the instant case from the case of *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.*[2] Counsel argued that under section 24(6) of Sabah Forest Enactment, 1968 the condition reads as follows:

"A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law."

Ismail Khan C.J. (Borneo) (as he then was) held in that case the words "personal to the holder and shall not be transferable in any manner whatsoever" are wide enough to include any form of assignment however disguised. In that case the agreement was held to be illegal. It was also held that a Power of Attorney executed in that case was a colourable device to deceive.

Counsel for the plaintiff argued that there were no such wordings in Trengganu Forest Enactment or under the rules.

Two more Sabah timber cases, *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.*[3] and *Nam Seng & Co.* v. *Wing Yew (Tawau)*

Co. Sdn. Bhd.[4] were similarly distinguished. In the former case clause 17 of the conditions attached to the licence reads as follows:

"The licensee shall not assign the benefits of this licence or assign, transfer, charge or part with any right or privilege thereunder...."

and of course the same section 24(6) of Sabah Forest Enactment came to play where it provides that a licence shall be personal to the holder.

Thus, plaintiff's counsel submitted that the law and the conditions relating to the licences in the above cases are not *in pari materia* to rule 2 of Trengganu Forest Rules which rule, as submitted by him, is only designed to identify the person from whom revenue will be collected and nothing more.

Counsel for the defendant submitted that the agreement was illegal and quoted the above cases to support his contention. He also cited the case of *Chai Sau Yin* v. *Liew Kwee Sam*[5] where it was held that the appellant in that case was entitled to rely on his own illegality.

Thus, it all boils down to the interpretation of rule 2 of Trengganu Forest Rules and the words "No licence thus issued ... shall be transferable."

If we consider the agreement entered between the parties herein it is obvious that for all intents and purposes a transfer of a substantial right obtainable under the licence from the plaintiff to the defendant was made under the agreement. The only thing left with the plaintiff was the name in the licence to remain in his name and under Clause 8 it was provided that the plaintiff should seek further extension or extensions of the licence as required by the defendant. Strictly speaking, the licence was not transferred as what is normally done in the case of land transfers registered in the Land Office. This is what counsel for the plaintiff contends as he said, if there is such a transfer as in land transfer registered in the Land Office, then and only then it would be illegal.

But before I go any further, I would look at the meaning of licence whether it is merely a piece of paper or whether it is coupled with some rights and obligations that go with it. The ordinary meaning of licence is a grant of permission to do something as for the manufacturing of patent medicine, driving a motor vehicle or using a television set or in this case to extract timber. The document under which these rights are conferred is called a licence. Hence, if any document does not grant such permission or right it does not have the character of the licence. Further, if you transfer a licence, you transfer certain rights that go along with it. This being the case, rule 2 must be construed that the transfer of the licence would include the rights thereunder.

Now, can the licence be transferred in the manner normally carried out in respect of land? Obviously it cannot be done. The normal thing is to revoke the licence granted to the original grantee and issue a fresh one to the new person. Therefore, it can also be construed that the transfer of a licence is not to be done by way of a land transfer. The law does not envisage such procedure and in fact there is no such procedure laid down by the law or the rules.

What is then prohibited by the law from being transferred? I am of the opinion the intention of the legislature was to prohibit transfers by way of agreements of the rights under a licence, as the rights must necessarily go with the licence.

My opinion is strengthened by the conditions of the rules. Rule 2 itself stipulates that no person shall operate logging operation without a licence. The defendant having no such licence cannot therefore operate the logging operation. Even a sub-licence is required where the licensee employs workmen for the purpose of his licence although this is within the discretion of the licensing officer to dispense with such sub-licence. Therefore, it can be agreed that the law will not allow a person to extract timber on a contract with a licensed holder. Rule 5(i) reads as follows:

"5.(i) When a holder of a licence in Form I employs workmen for the purpose of his licence, there may be issued, at the discretion of the officer empowered to issue such licence, a sub-licence in Form IV for every workman so employed. No such sub-licence shall be transferable or for a period exceeding three months or shall remain in force after the determination of the licence under which it was issued."

Here in the instant case the defendants are not the workmen of the plaintiff. They obtained rights not as an employment contract but as a result of consideration paid to the plaintiff for the rights under the licence. They are their own employers.

Rule 22 reads as follows:

"The person named in any licence or sub-licence issued under these Rules shall keep the same upon his person while at work, and at other times have it in his possession or at his workshed or his usual place of residence."

Therefore, it can be seen that only the person named in the licence can work in the licensed area as he has to keep the licence on his person whilst working. The defendants cannot possibly do so as they are not the person named in the licence.

As such I am of the opinion the agreement executed between the parties here is in effect a purported transfer of the licence which is prohibited by the rules and as such I hold it to be null and void as contravening section 24 of the Contracts Act, 1950.

I am asked by counsel for the plaintiff to consider section 66 of the Contracts Act, 1950 should I hold the agreement to be void. The relevant case is *Menaka* v. *Lum Kum Chum*[6] where it was held that as neither party in that case was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith, the appellant was entitled to restitution of the balance of the principal sum of $19,400. Section 66 of the Contracts Act, 1950 reads as follows:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

However, in the instant case, I am of the opinion that both parties were aware that the licence was not transferable as these words were clearly stamped on the face of the licence in spite of the fact that the contract was prepared by a solicitor. Further, both parties

have received benefits from the contract; the plaintiff money and the defendant timber extracted. I should therefore follow the decision of Gill J. (as he then was) in *Tan Bing Hock* v. *Abu Samah* where he ordered that the loss must lie where it falls.

I therefore dismiss the plaintiff's claim with costs agreed at $1,000.

Claim dismissed.

Solicitors: *S. Sivasubramanian; Ten Chin Yong & Appaduray.*

ABDUL RASHID BIN MOHAMED SALLEH v. DATIN HAJJAH MAIMON BINTE HAJI HARON

[O.C.J. (Abdul Razak J.) June 25, 1979]
[Kuantan — Civil Suit No. 165 of 1975]

Company Law — Invitation to purchase shares — Company already incorporated — Promoter — Director — Whether person so inviting an agent for company — Privity of contract.

In this case the plaintiff alleged that the defendant approached and invited him to purchase shares in a company to operate a supermarket in Kuantan. The plaintiff paid $15,000 to the defendant for the shares. The company later fell into difficulties and no shares were issued. A receipt for the sum paid was issued by the company. The defendant was at the material time a director of the company.

Held: whether the defendant acted as a promoter for shares of an existing company or as a director, she was an agent for the company and there was no privity of contract between her and the plaintiff and she could not be made personally liable.

CIVIL SUIT.

S. Sivasubramanian for the plaintiff.

Ten Chin Yong for the defendant.

Cur. Adv. Vult.

Abdul Razak J.: The plaintiff alleged that the defendant approached and invited him to purchase shares in Kimberly Mail Trade Sendirian Berhad to operate a supermarket in Kuantan.

According to him, on or about August 1, 1973, he paid the defendant a sum of $10,000 by cheque and on or about September 7, 1973, a sum of $5,000 by another cheque. No share certificate was issued and the said Kimberly Mail Trade Sendirian Berhad never operated the said supermarket and had become defunct. The plaintiff had demanded the return of the $15,000 but the defendant has failed or refused to do so.

The defendant in her defence denied receiving the said sums or any part of them; alternatively, if she had, the money was not received for the use of the plaintiff or under such circumstances as would entitle the plaintiff to recover from the defendant. Further, the defendant says that, on or about August 2, 1973, the plaintiff applied in writing, to Kimberly Mail Trade Sendirian Berhad, a limited company duly incorporated, for $20,000 shares at $1 per share. Pursuant to the said application, and in part payment of the said shares, the plaintiff paid the said company two cheques for $10,000 and $5,000 dated August 2, 1973 and August 7, 1973 respectively. Both cheques were drawn in the name of Kimberly Mail Trade Sendirian Berhad by the plaintiff, for which receipts were issued. It was contended also that there was no privity of contract between the plaintiff and the defendant. The plaintiff and the defendant gave evidence on the terms set out in the above averment.

In his submission, counsel for the defendant said that there was no privity of contract between the plaintiff and the defendant, but, between the plaintiff and Kimberly Mail Trade Sendirian Berhad. He conceded that if there was a privity of contract between the plaintiff and her, she was liable to pay. He said that all the circumstances showed that the plaintiff knew that he was dealing with Kimberly Mail Trade Sendirian Berhad. He addressed his application form for shares to Kimberly Mail Trade Sendirian Berhad. The receipt for money received was issued by Kimberly Mail Trade Sendirian Berhad. The Managing Director of Kimberly Mail Trade Sendirian Berhad directed the firm's accountant to issue shares to the plaintiff. It said that the firm had got into an unfortunate situation of not being able to pay its debts and became insolvent. The case does not come within any of the exceptions to the doctrine of privity.

For the plaintiff, it was argued by counsel, that the defendant was a promoter. A person may become a promoter before or after its incorporation. It was contended that although at the relevant time the defendant was not a director, she was a promoter. He cited the principle in *Halsbury's* (at page 100 Vol. 6, 3rd ed.), that a promoter, even though he expressly purports to act as agent or trustee, is personally liable upon all contracts made with him on behalf of the *intended* company until the contract has been performed or rescinded by either party under some power in the contract, or, by consent of all parties, or, until the company has, with the consent of the other contracting party, undertaken the liability, of the promoter under the contract. For the principle to apply to the promoter, therefore, the contract by him must have been for an *intended* company, one which had not come into existence. But, it is clearly shown that the company here was incorporated on November 18, 1972 whilst the alleged contract was entered into as claimed on August 1, 1973.

The position of the promoter who purports to act on behalf of the company, *after its incorporation,* is not very clear. It is stated in principle that a company is not bound by a contract purporting to be entered into on its own behalf by its promoters or other persons before its incorporation. The company cannot, after its incorporation, ratify or adopt any such contract made before its incorporation because there is in such cases, no agency and the contract is that of the parties making it. (*Halsbury's* Vol. 6, 3rd ed. para 824). It seems to imply therefore, such contract entered into by the promoter *after its incorporation,* binds the company as if it had been entered into by it, provided that the company ratifies or adopts the contract subsequently. (*Halsbury's* Vol. 6, 3rd ed. para 417). To that extent, therefore, the promoter must be the agent of the company since it is difficult